CleanSoils, Inc. *and* Michael Hayes *and* Stanley Frantz *and* Bruce Allen Manderson Jr. *and* International Union of Operating Engineers, Local Union No. 302, AFL–CIO. Cases 19–CA–22922–1, 19–CA–22922–2, 19–CA–22922–3, 19–CA–23125, and 19–RC–12751

April 28, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On November 1, 1994, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent has filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, CleanSoils, Inc., Roseville, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Interfering with, restraining, or coercing nonsupervisory employees in the exercise of their statutory rights by discharging or otherwise discriminating against supervisory personnel for giving testimony in a hearing before the National Labor Relations Board.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce nonsupervisory employees in the exercise of their statutory rights by discharging or otherwise discriminating against supervisory personnel for giving testimony in a hearing before the National Labor Relations Board.

WE WILL NOT terminate, discharge, or otherwise discriminate against you because you engaged, or are suspected of engaging, in activity on behalf of International Union of Operating Engineers, Local Union No. 302, AFL–CIO or on behalf of any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Michael Hayes, Stan Frantz, and Bruce Allen Manderson Jr. immediate and full reinstatement to the positions from which they were terminated on August 31, 1993, dismissing, if necessary, anyone who may have been hired or assigned to perform the work which they had been performing prior to their unlawful terminations, or, if any of those positions no longer exist, to a substantially equivalent position or positions, without prejudice to seniority or other rights and privileges, and WE WILL make Hayes, Frantz, and Manderson whole for any loss of pay and benefits suffered as the result of the discrimination directed against them, with interest on the amounts owing.

[1] In the absence of exceptions, we adopt pro forma the judge's sustaining the challenges to the ballots of Michael Hayes, Randall Roe, Wesley D. Faulkner, Joe Pete Smith, Robert D. Hughes, and Terika Kons, and his overruling the challenges to the ballots of Mike Turner and Thomas Knack.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's conclusion that the Respondent violated the Act by discharging the alleged discriminatees, we find it unnecessary to rely on his statement that when the discriminatees were informed of their discharges, they were not given a reason for being discharged. Further, in adopting the judge's conclusion that the Respondent's November 12, 1993 letter to the discriminatees did not constitute a valid offer of reinstatement, we find it unnecessary to rely on his statement that respondents must ''plainly state'' that they are offering ''reinstatement'' to discriminatees.

[2] In view of our adoption of the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging Supervisor Michael Hayes, we find it unnecessary to pass on his finding that the Respondent's conduct also violated Sec. 8(a)(4), because the remedy would be the same in any event. *Kunja Knitting Mills U.S.A.*, 302 NLRB 545 (1991); *Kessel Food Markets*, 287 NLRB 426, 453 (1987); *Orkin Exterminating Co.*, 270 NLRB 404 (1984). We shall modify the judge's recommended Order and notice to employees accordingly.

WE WILL notify Hayes, Frantz, and Manderson that we have removed from our files any reference to their terminations of August 31, 1993, and that those terminations will not be used against them in any way.

CLEANSOILS, INC.

Daniel R. Sanders, for the General Counsel.
James K. Poucher and *John K. Poucher*, of Roseville, Minnesota, for the Respondent.
Malcolm J. Auble, of Anchorage, Alaska, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. On September 1, 1993,[1] the charges in Case 19–CA–22922–1, alleging violations of Section 8(a)(1), (3), and (4) of the Act, and in Cases 19–CA–22922–2 and 19–CA–22922–3, alleging violations of Section 8(a)(1) and (3) of the Act, were filed. On December 21 the charge in Case 19–CA–23125, alleging violations of Section 8(a)(1) and (3) of the Act, was filed and a first-amended charge was filed in that case on January 14, 1994, alleging violations of Section 8(a)(1), (3), and (4) of the Act.

On October 29 the Regional Director for Region 19 issued an order consolidating cases, consolidated complaint and notice of hearing in Cases 19–CA–22922–1 through 19–CA–22922–3, alleging violations of Section 8(a)(1), (3), and (4) of the Act. On February 1, 1994, the Regional Director issued an order further consolidating cases, consolidated amended complaint and notice of hearing, adding Case 19–CA–23125 to those already consolidated for hearing and decision on October 29. On February 7, 1994, the Regional Director issued an amendment to the consolidated complaint and on March 14, 1994, issued a second amendment to consolidated amended complaint.

On February 23, 1994, the Regional Director issued a Report on Challenged Ballots and Direction of Hearing in Case 19–RC–12751. It directed that a hearing be conducted regarding the eligibility of 12 individuals who had appeared to vote in the representation election conducted in that case on November 9 and whose eligibility to do so had been challenged. By order on that same date, the Regional Director consolidated that hearing with the one to be conducted in Cases 19–CA–22922–1 through 19–CA–22922–3 and 19–CA–23125.

I conducted that hearing in Anchorage, Alaska, on April 7, 1994. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that have been filed, and on my observation of the demeanor of the witnesses, I make the following

[1] Unless stated otherwise, all dates occurred during 1993.

FINDINGS OF FACT

I. JURISDICTION

At all material times CleanSoils, Inc. (Respondent) has been a Minnesota corporation, with office and place of business in Roseville, Minnesota, engaged in the nonretail business of cleaning petroleum-polluted soils through low temperature thermal desorption at various locations in the United States, including Alaska. In the course and conduct of those business operations during the 12-month period preceding issuance of the second amendment to consolidated complaint, a period representative of all material times, Respondent sold and shipped goods or provided services valued in excess of $50,000 from its Minnesota facilities either directly to customers outside that State or to customers within Minnesota, each of whom engaged in interstate commerce by other than indirect means. Therefore, I conclude, as admitted by Respondent, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all material times International Union of Operating Engineers, Local Union No. 302, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

The ultimate question presented by the complaint is Respondent's motivation on Tuesday, August 31, for selecting Michael Hayes, Stan Frantz, and Bruce Allen Manderson Jr. for layoff or termination.[2] Respondent contends that their selection had been a logical choice dictated by its need to reduce personnel in Alaska due to diminished business there. The existence of diminished business in Alaska by late summer is not challenged by the General Counsel. He does challenge, however, Respondent's motivation for selecting Hayes, Frantz, and Manderson for separation from employment on August 31, alleging that Hayes had been selected because of his testimony as a witness for the Union during a preelection representation hearing and, further, that Frantz and Manderson had been chosen because of their support, or perceived likely support, for the Union becoming the bargaining agent of Respondent's Alaska employees. For the reasons set forth, I conclude that a preponderance of the credible evidence supports the General Counsel's allegations.

B. *Events Preceding the Union Activity*

James K. Poucher owns all shares of the stock of Respondent. As set forth in section I, above, it engaged in the business of cleaning petroleum-polluted soils through a process of low temperature thermal desorption—that is, through

[2] As will be seen by reading further one or the other of these terms was used at various points during the hearing to describe the August 31 separations from employment of those three individuals.

heat. To accomplish that Respondent operates soil remediation plants, which can be moved by trailer from location to location, and various support and auxillary equipment.

As 1993 began Respondent was engaging in that business in Minnesota, Wisconsin, California, and Alaska. But by then it had become obvious that profit margins on operating revenues were not attaining Poucher's expectations. Indeed, Respondent appeared to be losing money. That appearance would be quantified in late July or early August when he received a financial statement revealing a loss of over $600,000 through June. Almost the entirety of that loss—$651,929.96 of $674,185.44—had been incurred by Respondent's Alaska operations.

During the first half of the year Respondent pursued various courses to correct its deteriorating financial situation. It implemented and insisted on observance of operating procedures and directives. It transferred equipment among locations to minimize new equipment purchases. It reduced the numbers of field and office personnel. Yet, none of these measures proved so successful as James Poucher had hoped. Finally, he persuaded his brother, John (Jack) K. Poucher, to accept the position of vice president for operations. In that capacity John Poucher took over all operations for Respondent and, he testified, as of the date of the hearing, ''I still have full rein of all the operations.''

His selection as vice president for operations had not been dictated solely by familial relationship. ''I designed some of the . . . state-of-the-art equipment that's been in use around the country,'' testified John Poucher and ''I basically designed and built every plant [Respondent's has], except for one.'' That exception, he testified, is ''the one-oh-one [101] plant,'' which was located in Anchorage during the period preceding the terminations on August 31.

It is not altogether certain from the evidence precisely when John Poucher actually began functioning as vice president for operations. From some questions posed by his brother, as well as from his own testimony, it appears that John Poucher did so on approximately July 1 or, at least, at the very end of June or the very beginning of July. According to John Poucher, on doing so, he observed generally that ''equipment wasn't being operated efficiently throughout all the divisions'' and that ''equipment was not being maintained,'' as well as that ''some of the costs for purchasing spare parts, replacement parts, tools, and supplies . . . were approaching the cost of labor.''

To correct at least some of those problems, John Poucher instituted several measures. He eliminated one level of supervision, personally replacing the managers for each geographic division and directing that division supervisors report directly to him: ''all the supervisors reported to me centrally, whereas before, they reported to the district manager, division manager in their state or region.'' He ''put together a corporate parts and maintenance type of a program.'' Due to what he perceived as high labor costs Poucher developed a form for reporting, on a daily basis, amounts of production and labor costs expended, doing so at each location. Each week the location supervisors reported those results directly to John Poucher. Every week or every other week he prepared an overall summary of results from all locations. Those summaries were then disseminated to all locations so that personnel there could evaluate their own performance against performance at other locations.

In addition, John Poucher formulated a minimum hourly production or throughput rate and a maximum labor cost per ton below and above which, respectively, soil should not be processed. That is, if those rates could not be achieved when processing contaminated soil, then production should not be conducted. Presumably, the soil should be stockpiled until there was a sufficient quantity to achieve those rates.

Not until late July or early August, he testified, did John Poucher actually journey to Alaska to inspect operations being then conducted in Anchorage and Kenai. Poucher testified that he ''believe[d] I arrived on Sunday or early Monday in Anchorage.'' Looking at a 1993 calendar and given the ambiguity of Poucher's testimony concerning when he had arrived in Alaska that could mean that he had arrived there during the night of Sunday, July 18, to Monday, July 19; or during the night of Sunday, July 25, to Monday, July 26; or during the night of Sunday, August 1, to Monday, August 2; or during the night of Sunday, August 8, to Monday, August 9. The significance of those dates pertains to Respondent's Alaska employment complement during those weeks in light of the ultimate selection issue posed by the complaint. Fortunately, Respondent introduced an abstract of work hours by Alaska employees (R. Exh. 7) for each week during the approximately 1-year period prior to the week ending August 20.

That abstract shows that during the workweek ending Friday, July 16, Respondent had employed in its Alaska division Stan Frantz, Gregg Garrison, Michael Hayes, Michael Johnson, Ron Johnson, Bruce Manderson, Matt Michael, Evelyn Moe, Tim Richardson, Randall Roe, Joe F. Singleton, Stan Sutton, Michael Turner, and Troy Watling. During the following workweek, ending on Friday, July 23, those same 14 individuals were employed there, along with Joe E. Singleton. But the latter is not shown to have again performed work for Respondent during any succeeding week embraced by the abstract. That also is the fact with respect to Michael Johnson, Evelyn Moe, Randall Roe, Joe F. Singleton,[3] and Michael Turner. Like Joe E. Singleton, none of those six individuals were employed in Respondent's Alaska division during subsequent workweeks ending July 30 and August 6, 13, and 20.

In contrast, during every 1 of those 4 workweeks Frantz, Hayes, Ron Johnson, Manderson, and Watling are shown as having continued to work for Respondent. Concerning two of the remaining four above-named individuals, no hours are listed for Garrison during the workweeks ending July 30 and August 6, but he is shown as having worked 10 hours during the workweek ending August 13 and 53 hours during the workweek ending August 20. Respondent's Exhibit 7 further

[3] Note that there are two Singletons: Joe E. and Joe F. Joe F. Singleton according to John Poucher, ''was division manager'' for Respondent's Alaska division and, in fact, R. Exh. 7 lists his title as ''Division Manager.'' Thus, he had been one of the individuals in that supervisory level whom John Poucher had personally replaced, as described above. It cannot be determined from the record whether Joe F. Singleton's employment with Respondent had been separated after the workweek ending July 23 or whether he had been transferred to another of Respondent's operations. But that is not an alternative whose resolution is material to resolution of the issues posed by the complaint, although it could be some basis for concluding that John Poucher had arrived in Alaska during the night of July 25 to 26, after which he personally replaced Singleton.

shows that Michael worked 45 hours during the workweek ending July 30, did no work during the workweek ending August 6, worked 35 hours during the workweek ending August 13, and worked ''0.00'' hours during the workweek ending August 20. Both Richardson and Sutton are shown to have worked 40 or more hours during the workweeks ending July 30 and August 13 and 20, but no entry of hours worked during the workweek ending August 6 is shown for either man. Inasmuch as John Poucher testified that he had met with Sutton during his first trip to Alaska, the absence of any hours for Sutton during the workweek ending August 6 appears to preclude that week as the one during which Poucher made his first Alaska trip.

With regard to titles and duties of those individuals other than the Singletons, Respondent's Exhibit 7 lists as laborers Garrison, Manderson, Richardson, and Turner. Frantz, Michael, and Roe are shown as panel operators. Michael Johnson is titled ''Engineer'' and Evelyn Moe as ''Office Manager.'' Ron Johnson's title is shown on that exhibit as ''Asst. Division Mn.'' When he appeared as a witness for the General Counsel Johnson testified that for almost a year prior to ''around the first of August,'' he had been ''the assistant to the Alaska division manager'' and thereafter had served as ''divisional coordinator'' until he ceased working for Respondent in mid-October.

Sutton, Hayes, and Watling are admitted to have been statutory supervisors and agents of Respondent while working for it during the summer. The complaint alleges and Respondent admits that during that time Sutton had been Respondent's field operations manager—Alaska division. He testified that he had occupied that position from January until he quit working for Respondent during September. In that capacity Sutton testified without dispute he had been ''in charge of both remediation plants,'' in Anchorage and in Kenai. Reporting directly to him had been Hayes and Watling. Regarding them, a seemingly inexplicable dispute emerged, although it may be that John Poucher perceived some sort of tactical advantage was being achieved by Respondent through his testimony regarding that subject.

Hayes testified that since the end of October 1992 he had been a ''[s]ite supervisor.'' Although Respondent does not contest the ''supervisor'' part of that title, John Poucher contested inclusion of the word ''site'' in the title, ''We don't have any titles as site supervisor. I want to make that clear. We have supervisors. The supervisors are in charge of the plant.'' Yet, when he appeared as a witness for Respondent, Troy Watling testified that his current position was ''[s]ite supervisor'' and that he had occupied that position, ''Since February of last year.'' Moreover, although Respondent's Exhibit 7 lists no title for either Hayes or Sutton and lists for Watling the title ''Kenai Supervisor,'' it does list for Rod Christopher and Ed O'Connor the title ''Site Supervisor.'' In fact, at some points during his questioning of witnesses, James Poucher also occasionally used the title ''site supervisor.''

Be that as it may John Poucher testified that when he had arrived in Alaska working in Anchorage had been Hayes, Frantz, and Manderson, with all other Alaska field personnel—those classified as site supervisor, panel operator, and laborer—as well as Sutton, working with the remediation plant then located in Kenai. As site supervisor, or as supervisor, Hayes had been as John Poucher testified, ''in charge of the plant'' being operated in Anchorage, denominated SRU 101. Frantz had been the panel operator, the classification to which he had been assigned by Respondent when he had been hired and had begun work on February 24.

According to Respondent's Exhibit 7, Manderson had commenced working for Respondent on July 17, 1992. It lists his title as ''Laborer.'' He testified, however, that he had been so classified only since July when, after having been laid off from the position of expediter-laborer in which he had been classified prior to then while working for Respondent, he had been rehired as a laborer. Manderson testified that the period of that layoff had been for ''a couple of days'' and, indeed, a review of the entries by his name on Respondent's Exhibit 7 reveals hours of work listed for Manderson during every workweek after the one ending May 7.

Poucher testified that almost all of his time during that visit to Alaska had been spent in Anchorage. For, he testified, and that testimony is not disputed, he had observed a series of problems with the manner in which operations were being conducted there: The plant was being operated at an excessive temperature, it was being operated at a throughput below Poucher's above-mentioned minimum level, excessive carbon monoxide was being emitted by the plant, and no soil profile sheet was available. After ordering the plant shut down and preparing a soil profile sheet, John Poucher testified, ''we started up the plant again . . . and were running at the new parameters, primarily running at approximately 400 degrees temperature Fahrenheit.''

Nonetheless, testified Poucher, again without contradiction, when he returned to the site on the following day he discovered that the plant was not being operated. He was told by Hayes ''that they decided they were going to repair a conveyor belt.'' According to Poucher, repair of a conveyor belt ''should take no longer than two hours for two people,'' but by the end of that workday ''they still didn't have the belt changed.'' So, he testified, ''I got hold of Sutton in Kenai and I told him to drive to Anchorage immediately.''

Sutton did so, arriving in Anchorage by the following morning. An examination of the SRU 101 plant ''uncovered several items that needed to be changed,'' testified John Poucher, explaining that ''there were several situations that were, I'd say jimmy-rigged, I guess.'' He characterized the repairs, however, that were needed as ''very simple'' ones and, as a result, ''basically in the course of the next day, we got everything repaired,'' and ''the plant was fired up the next day.'' During that period, Poucher testified that he also ''reviewed with [Sutton] my great displeasure with the operation in Anchorage. I told him to stay in Anchorage . . . until this was running at the expected efficiencies.'' Significantly, as will be seen, Poucher further testified that ''after some of those things were adjusted . . . the plant literally jumped up in . . . throughput almost three times, and operated that way pretty much for the month of August, where we had little problems, ran relatively smoothly.''

Before leaving Alaska, Poucher drove to Kenai where he reviewed with Watling operation of the plant located there, denominated SRU 107. Poucher testified that Kenai operations were satisfactory. As a result, after spending approximately a day in Kenai, he returned to Anchorage from which he ultimately departed Alaska.

C. *The Organizing Campaign and Related Incidents*

When John Poucher left Alaska he left behind something more than a ''relatively smoothly'' functioning operation in Anchorage. On August 16 the petition was docketed in Case 19–RC–12751 seeking an election among all employees employed by Respondent in Anchorage and Kenai. On that portion of the petition numbered 6a and 6b, the Union recited that there were six employees present in the unit and that the petition was ''supported by 30% or more of the employees in the unit[.]'' Apparently that 30-percent showing-of-interest had been secured when, prior to August 16, Hayes had contacted Ed Kareen, the Union's district representative, and on the following day accompanied by Frantz and Manderson had met with Kareen and Field Representative Malcolm J. Auble.

Manderson testified that following that meeting he never spoke about the Union with any of Respondent's other employees. Nor did Hayes testify that he had done so. Frantz testified, however, that he discussed his visit to the Union during telephone conversations with Watling, Richardson, Michael, and Garrison. When Watling and Richardson later came to Anchorage, testified Frantz, he had met with them at Richardson's home where he informed them that he, Hayes, and Manderson had signed up for representation by the Union. According to Frantz, he also had explained to Watling and Richardson the benefits that he felt that the Union could provide and had inquired if either man was interested. Frantz testified that Watling had responded, ''it'd be a good idea to stay away from the whole thing. He wanted nothing to do with it,'' and Richardson had said that he would go along with Watling.

Appearing as a witness for Respondent, Watling testified generally, ''I hadn't heard anything about the petition until the last couple of days.'' More specifically, he denied having met with Frantz at Richardson's home and, further, denied that any of Respondent's employees had called him about the Union. Still, Watling never disputed with particularity that he and Richardson had discussed the Union with Frantz and, more importantly, never denied that he had been informed by Frantz of the identities of those who had signed up for the Union. That is he denied merely that any remarks had been made to him by telephone or at Richardson's Anchorage house.

Nor did Watling contest Frantz's testimony that after beginning work for Respondent on February 24 Frantz had asked Watling, who had been a site supervisor ''[s]ince February of'' 1993, why Respondent was not unionized. According to Frantz, Watling had replied, inter alia, that ''in the past they had tried to reorganize [sic] back in the Midwest, Wisconsin, Minnesota area, and . . . the guy who initially proposed it got fired.'' As it turns out that had not been the first occasion when the subject of a union had arisen.

Manderson, who as pointed out above began working for Respondent in July 1992, testified that during early September of that year he had been working at pump station 3 with, among others, Eric Shellum, Ed O'Connor, and Watling. Of course, that was before Watling had become a site supervisor. Manderson testified, however, without contradiction, that ''at that time [Shellum] was an operations manager for'' Respondent whose ''main duties were to finish building the plant, overseeing and finish building the plant at Pump Station 1 and getting ready for the stack tests on plant number 107 [then] at Pump Station 3.'' In fact, Respondent's Exhibit 7 shows that Shellum had worked in excess of 40 hours in each of the workweeks ending September 4, 11, 18, and 25, 1992, as well as during the one ending October 2, 1992. Moreover, as is true of Sutton and Hayes, both admitted statutory supervisors when working for Respondent, no entry appears by Shellum's name under the title column of that exhibit. In sum, there is ample basis in the record for concluding, and I do, that Shellum had been a statutory supervisor during September 1992.

So, too, had been O'Connor. In its answer to consolidated complaint, Respondent ''denie[d] that Ed O'Connor is or was a Supervisor within the meaning of the [A]ct but admits that he was a shift foreman on Alyeska Pump Station #3 in 1992.'' John Poucher testified that O'Connor ''was never a supervisor in Alaska because Joe [Singleton] wouldn't make him one.'' Yet, as pointed out above, Respondent's own Exhibit 7 lists O'Connor as a ''Site Supervisor'' and, also, shows that he had worked during the same September 1992 workweeks as had Shellum. Respondent never did explain why its own records had listed O'Connor as a site supervisor if he had not been one. And, affirmatively, Hayes testified that he had been told by Joe Singleton that O'Connor was ''the supervisor'' and that O'Connor's title had been site supervisor at the Kenai plant where Hayes had worked for approximately 3 weeks during late 1992. I conclude that the evidence establishes that O'Connor also had been a statutory supervisor at least during 1992.

The significance to Shellum's and O'Connor's positions is that Manderson testified that on two occasions while working at Pump Station 3, during September 1992, he had inquired about Respondent's history in Minnesota. In response, testified Manderson, Shellum, and O'Connor had said, inter alia, that ''Jim and Jack Poucher were against any type of union organization trying to come in and set up representation for any of the [Respondent] workers. And their basic comments were that they would—they would basically try to do anything they had to stop the union from organizing.''

In fact, James Poucher acknowledged that Respondent ''has been involved in a union organization effort before,'' apparently during 1991 when, he testified, ''I was involved in a similar situation in Minnesota.'' He further testified that then, however, as in Alaska during 1993, ''We used the exact, same strategy. . . . And that was to let the employees decide.'' But if James Poucher had truly been unconcerned about whatever choice regarding representation would be made by Respondent's employees, his brother was less disinterested. For Sutton testified that John Poucher had during a telephone conversation ''asked if I knew who was behind'' the petition.

To be sure, Sutton went on to testify that when he had responded that he did not know the answer to that question, John Poucher had pursued the subject no further. John Poucher agreed, however, that he had sought from Sutton information concerning which employees were supporting the Union. ''I tried getting information from Stan and he said he didn't want anything to do with it and he knew nothing. That's Stan Sutton.'' Yet, the rest of Poucher's answer demonstrated that he had not confined his inquiry to Sutton. For although he denied having similarly questioned Watling and Hayes about the subject, and further testified, ''I had no idea who was for, who was against, had no clue,'' John Poucher's

full answer discloses a more far-reaching inquiry about the Union's supporters than simply one directed at Sutton:

> There was a lot of rumors and I—I couldn't get any of the employees—I—I tried getting information from Stan and he said he didn't want anything to do with it and he knew nothing. That's Stan Sutton. I did not ask Troy, did not ask Hayes, and I basically was trying to pick up some information when I was up there during that week, the last week in August. And nobody was talking, nobody knew anything, and it was all very hush-hush.

Accordingly, although he did not identify the individuals with whom he had spoken, John Poucher admittedly had been trying to ascertain the identities of the Union's supporters in Alaska during the last week in August. And there is no basis for assuming, much less concluding, that his interest in that subject had been either legitimate or benign.

D. *The August 31 Termination*

John Poucher had returned to Alaska during the last week of August. So, also, had his brother James come there during that week, apparently because the preelection representation hearing was scheduled to open on Friday, August 27.

At the end of the immediately preceding workweek operation of the SRU 107 plant in Kenai had been shut down. According to John Poucher Respondent laid off two or three employees who had been working there. Kenai employees who were not laid off were transferred to Anchorage where they worked a second or night shift, John Poucher testified, ''to get the dirt out, because we had a dead line.'' The weekly production log for that week (included in R. Exh. 5) shows a day and night shift operated plant SRU 101 in Anchorage on Monday, August 23, on Tuesday, August 24, and on Wednesday, August 25. Only a day shift operated SRU 101 on Thursday, August 26, and it was not operated at all on Friday, August 27, the day that the representation hearing opened.

At the hearing on that day two witnesses testified: James Poucher for Respondent and Hayes for the Union. On the following Tuesday, August 31, Hayes, as well as Frantz and Manderson, received employee separation notices. Those notices are a form with blanks to be filled in. All three notices are completed identically, save, of course, for the name of the person to whom issued. Thus, the issuance ''Date:'' filled in on each is ''8-31-93.'' Of the three choices printed to describe the nature of the separation—Termination, Resignation and Layoff—an ''X'' has been placed on the line before ''Termination'' on each notice. Also on each one, after ''Reason:'' is handwritten, ''Lack of Work.'' John Poucher had signed all three notices.

Hayes testified he had become aware that he was being ''let go'' on August 31 when he had been given his completed notice by Sutton who ''said that he was sorry that—that it was going that way, and he didn't have any control over it.'' Sutton did not contradict that account. Nor did he dispute having also said to Hayes that the termination ''wasn't his choice.''

Like Hayes, Frantz testified that he had learned about his termination on August 31 when he ''came into work and Stan Sutton gave me my termination slip and shook my hand and said that he was sorry and it was beyond his control, and he would do anything in his power to help me find new employment.'' In contrast, Manderson testified that he had first learned of his termination on ''Friday or Monday,'' he appeared uncertain as to which, when he had received a telephone call from Sutton who said, ''I was going to be terminated and that I needed to come in the next day and pick up my termination slip.'' When he did so, testified Manderson, he was handed the completed notice by Sutton who ''just sort of apologized and said he was sorry to have to do this. And he—he basically said he would try to see what he could do for me or help me out any way I needed help if I needed help.''

Sutton testified that in fact he had not selected any of the three alleged discriminatees for separation from Respondent's employment. Instead, he testified, their selection had been made by John Poucher. And it was Poucher who provided the most testimony on behalf of Respondent concerning the August 31 terminations. But, as discussed more fully in subsection F below, the account that he advanced is not corroborated and in several instances is contradicted by other evidence, with the result that his account of the termination decisions simply cannot be relied on. Indeed, those matters serve to support the impression that I formed, as he testified, that John Poucher was not being candid. Nonetheless, some aspects of his testimony about the termination are worth noting at this point.

First, he testified that the decision had been ''to lay off, not terminate'' three individuals. Second, he testified that the decision regarding who would be selected had been made by Sutton: ''I asked Stan Sutton who we're going to lay off, not terminate, because we don't have enough work. I said we need to pick three people,'' and ''I asked Stan what he proposes.'' Third, Poucher testified that his asserted conversations with Sutton had occurred ''on Thursday, just before the 27th—that might be—I think it's the 26th—I discussed with Stan the situation in Anchorage.'' Fourth, Poucher admitted that he had prepared the three separation notices, but testified that he had done so because ''it was Friday morning and the crew was coming in to work, and Stan was nowhere to be found at the time. And we weren't going to be processing that day, and so I wrote up the slips.'' That reference to ''Friday morning'' cannot be regarded as a mere slip of the tongue, for John Poucher went on to testify, ''And I'm not sure when Stan verbally talked to each one of the three people, Hayes, Manderson, and Frantz. I assumed it was all on Friday.''

E. *The Offers to Return to Work*

As described in the Statement of Case above the charges in Cases 19–CA–22922–1 through 19–CA–22922–3 were filed on September 1. In early October then-Division Coordinator Johnson telephoned Manderson. Johnson testified that during their conversation he had asked Manderson ''if he was interested in going back to work.'' Manderson testified that Johnson had inquired, ''if I was ready to come back to work or if I wanted to come back to work.'' Both Johnson and Manderson testified that the latter had asked a series of questions concerning a return to work and that Johnson had been unable to answer any of them. Thus, Manderson testified that he had asked, ''[W]hat I would be getting paid, what position I'd be coming back as, and where I'd be work-

ing.'' Similarly, Johnson testified that Manderson had asked, ''[W]hat would his wages be, what would he be coming back as, how long would it last, those types of questions.'' Because Johnson did not know the answers he promised to find them out from Watling or to have the latter call Manderson to provide them. In fact Watling did call Manderson. But there is a disparity between their accounts of a portion of that conversation.

According to Manderson, save for the job or position to which he would be assigned, Watling had been unable to answer Manderson's other questions. Which were where Manderson would be working, the shift on which he would be working, and how much he would be paid. Regarding those questions, testified Manderson, Watling said, ''[T]hat those answers would have to come from Jack Poucher. And he said he would try to get in touch with Jack, and then find out the answers to those questions and then give me a call back the next day.'' Watling did not do so on that day, however, nor on any subsequent one. Manderson testified that ''when he said he was going to call me back, I took him at his word,'' and so never attempted to initiate a call to Watling thereafter.

Concerning the job or position that Manderson testified that Watling had specified during their telephone conversation, according to Manderson, then classified as a laborer, Watling had said, ''I would come back running a loader.'' It is not disputed that loader operator is a higher rated classification than laborer and, testified Manderson, ''I remember saying that I wouldn't come back and run the loader full-time on a laborer's hourly—hourly wage.'' Manderson explained that he knew of no one who operated a loader at a laborer's pay rate. That explanation is not contradicted by any other evidence.

Watling contested only that portion of Manderson's description of their telephone conversation pertaining to the job or position discussed. He denied having said that Manderson would return as a loader operator. For, according to Watling, Respondent's need had been for more laborers and he had told as much to Manderson during their telephone conversation. Moreover, testified Watling, Manderson had said, ''[T]hat he wanted a raise, he pretty much told me that that was his condition for coming back and he wasn't interested'' in returning at his former pay rate. As Respondent had no intention of granting a raise for work as a laborer, Watling testified he had seen no need to again contact Manderson about renewed employment.

Frantz also described a fall communication regarding employment from Respondent. He testified that Watling had called and had asked if Frantz was ready to go back to work. When he replied that he was, testified Frantz, Watling had said, ''[T]hat he would get back with me as soon as he talked to Jack and found out specifics.'' According to Frantz, after 2 days passed without further communications from Respondent, he telephoned Watling who said, ''[T]hat there was going to be some work coming up and that—soon as they were going to run, he'd give me a call and—at that time.'' Frantz testified that when he received no call he went to the Anchorage plant site where Watling said, ''Okay, tomorrow morning, be here to work.'' Watling did not deny having spoken those words to Frantz, but testified merely that he did not recall having said so to Frantz.

When he reported for work on the following day, Frantz testified, Watling had not been there and so he began operating the loader. He testified, however, Ron Johnson ''come out and told me that I—I needed to get off the loader and that I wasn't working, because he—he had not heard anything. So then I just went home.'' Having heard nothing from Watling for the remainder of that day, testified Frantz, on the following day he called Watling who said, ''Well, we don't really have any position for you right now,'' because, ''He had the crew they needed.''

Watling testified that because he had not been there that day, his only knowledge about the incident at the site described by Frantz came a couple days later, from a report that Frantz had showed up, had begun operating a loader, and had been stopped from continuing to do so by Panel Operator Michael, after which Frantz had gotten in his truck and had driven from the site. According to Watling he had received that report from Michael. But Michael was never called as a witness to corroborate having made such a report to Watling nor to give a first-hand description of his supposed direction Frantz to cease operating the loader. In contrast, consistent with Frantz's account, Johnson did appear as a witness and he testified that he had been the one who had stopped Frantz from operating the loader.[4]

Letters, dated November 12 and signed by John Poucher, were sent to the three alleged discriminatees. Each stated to the extent pertinent:

> As you may be aware, we have not operated more than one plant at a time since your termination on August 31, 1993 due to lack of work. You should also be aware of the down sizing in overhead and field work forces due to major financial losses in Alaska. You were informed that due to these losses and less work, positions and the organization were changed. All field salaries were reduced accordingly. As you were told upon discharge, the crew which performed the best according to process throughput and labor cost per ton would be kept on to work both plants part time.
>
> At this time we are going to operate both plants as conditions permit. We cannot process the Indian job at this time due to high moisture content. However, we will run the other material staged, provided that a throughput of twenty tons per hour is maintained. This is the same policy that was applied last July and August for SRU 101 while you worked in Anchorage.
>
> Please report for work at the Anchorage office Monday, November 15, 1993 at 8:00 a.m. You will be reporting to Troy Watling and will be processing soil with SRU 101 until operations are closed for the season. You will be paid at the same hourly rate. If there are any questions regarding this matter please contact Troy Watling for details.

Below Poucher's signature and title appears the following, ''I acknowledge the above and agree to return to work for [Re-

[4] I place no reliance on Johnson's further testimony that he had told Frantz that day that James Poucher had said that Frantz nor Hayes nor Manderson would be rehired by Respondent. Frantz did not testify that such a statement had been made to him by Johnson and I have no doubt that had such a statement actually been made to him Frantz would have remembered and testified about it.

spondent]. I understand that I report to Troy Watling and that work is limited.'' Below that appears a signature line.

All three alleged discriminatees responded to the letter. But the response by Hayes differed from that of Manderson and Frantz. The two employees reported on November 15 as directed by the letter. Both of them and, also, Watling testified that the latter had said that Frantz and Manderson had to sign copies of the letter, on the above-described signature line, before being allowed to return to work. And all three agreed that the two employees refused to do so. Frantz and Manderson each testified that his refusal had been based on the fact that the letter was false with regard to the final sentence of the above-quoted first paragraph, which pertained to what ''you were told upon discharge[.]'' Each denied that such a statement had been made to him when he had been terminated. And, as Frantz explained, ''If I signed this, I did not know how or what kind of repercussions there would be on the outcome of the problem at hand.''

According to Manderson and Frantz, their refusal to sign had ended their interview with Watling. The latter testified, however, that following the two employees' refusal to sign copies of the letter he had interrupted the discussion and had telephoned James Poucher who had ''said that it doesn't matter if they sign it or not, they can still come back to work.'' According to Watling he had related that information to Frantz and Manderson and, at the same time, ''told them that we were just going to be working 40-hour weeks,'' with no overtime. Watling testified that the two employees replied, ''[T]hat they didn't want to work if we were only going to be working 40 hours.'' Frantz and Manderson each denied, however, that Watling had ever said that there was no need for them sign the letter as a condition of reemployment with Respondent. They denied that there had been any change during the conversation regarding the condition of signing copies of the letter to return to work.

Hayes testified that he had not received his copy of the November 12 letter until the afternoon of November 15 after the 8 a.m. reporting time recited in it. Moreover, by that time he had obtained employment elsewhere and felt that he needed to give that employer sufficient 2-week notice before leaving its employment. Thus, he sent his own letter to Respondent, dated November 17, explaining those facts and, also, seeking assurance from Respondent of ''continued employment beyond this period.'' By letter dated November 22 John Poucher replied that Respondent could not provide that assurance and, as ''we plan to work only one or two more weeks as weather permits,'' Respondent ''cannot provide two weeks notice for you and, therefore, it is your decision not to report to work.''

One additional employment offer was extended to Hayes, Frantz, and Manderson. By letter to each, dated March 22, 1994, John Poucher gave notice that ''We are expecting to begin operations in Anchorage on April 6, 1994, weather permitting.'' The letter goes on to recite, ''Please contact Amanda in the Anchorage office before March 31 if you will return to work. If we don't hear from you by March 31, we assume that you are not interested in returning to [Respondent].'' Frantz was the only alleged discriminatee who responded to that letter. He accepted employment and resumed working for Respondent on April 6, 1994, the day before the hearing in this matter.

F. *Discussion*

The General Counsel does not challenge the evidence that Respondent's volume of Alaska division business had declined by August 31. Nor is it disputed, at least in the abstract, that layoff or termination would have been an appropriate response to such a work decline. Although the evidence shows that Respondent had followed both courses in the past, however, there also is evidence that such a course might not have been the one chosen at the end of August absent the filing of the petition in the middle of that month. Indeed, although there were post-August 31 days when no work was performed in Respondent's Alaska division, there is no evidence that Respondent went so far as to terminate any crewmembers then working there other than the three alleged discriminatees.

Sutton agreed that there had been very little soil in Anchorage by the end of August and, further, that ''there wasn't much soil in Kenai at that time either.'' Still, he testified in response to questioning by Respondent that had the choice been his at the end of August, ''I would have let the guys in Kenai do the work down in Kenai and kept the guys in Anchorage [to] do the work in Anchorage,'' with each crew working part-time in each location and not working whenever there was no soil to process at the location to which that crew was assigned. In that way there would continue to be a crew at each location available to process whatever soil became available for processing there.

That testimony by Sutton is significant in context of Respondent's practice in Alaska. For it is undisputed that in the past Sutton had routinely made layoff decisions: ''I consulted with Joe Singleton on that, and it was up to me who was getting laid off. I made that decision on who I would keep and who I'd let go.'' Of course, by the end of August John Poucher had, in effect, replaced Singleton. And it appears to have been an effort to demonstrate a conformity with that Alaska practice that led Poucher to testify, as described in subsection D above, that he had conferred with Sutton prior to the terminations, but that Sutton had made the termination decision and incident selection of individuals to be terminated on August 31. Yet, inasmuch as Sutton denied having made those decisions and, further, testified that termination was not an alternative that he would have chosen, had the decision been his to make, there is ample basis for concluding that terminations would not have been made at all if the practice of allowing Sutton to decide what course to choose had truly been followed at the end of August.

Beyond the question of which alternative course of action could have been chosen, the General Counsel argues that the evidence does not credibly show, absent the representation petition's filing, that Hayes, Frantz, and Manderson would have been selected for termination at the end of August. That is, argues the General Counsel, the credible evidence fails to support Respondent's contention that each one had been a logical selection for termination, although, in contrast, a preponderance of the evidence shows that their selection had resulted from the revealed or at least suspected statutorily protected activity of each.

As described in subsection C above, Respondent is hostile to unionization of its employees. An indication of that fact emerges from the timing of the August 31 terminations, which were at the beginning of the workweek immediately following the day during which the Anchorage Crew Super-

visor Hayes had testified as the lone witness for the Union during the representation hearing. ''Timing alone may suggest anti-union animus as a motivating factor in an employer's action.'' *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984).

Nor is it necessary to predicate a conclusion of animus exclusively on an inference drawn from timing. For it is undisputed that two statutory supervisors, Shellum and O'Connor, had warned Manderson that ''Jim and Jack Poucher were against any type of union organization trying to come in'' and ''would basically try to do anything they had to stop the union from organizing.'' That same attitude on the part of the Pouchers appears to have been the basis for Watling's later warning to Frantz, when the latter inquired about Watling and Richardson's interest in supporting the Union, that ''it'd be a good idea to stay away from the whole thing.''

Furthermore, following the filing of the petition John Poucher admitted that he had been ''trying to pick up some information'' concerning the identities of the people behind the Union's campaign. Poucher never explained his purpose for having done so. Consequently, he advanced no legitimate reason, nor does the record suggest one, for having attempted to ascertain the identities of the Union's supporters. In light of these considerations, a preponderance of the credible evidence supports the conclusion that Respondent harbors animus toward the concept of unionization of its employees and, as well, toward individuals who would support an effort to become represented by a bargaining agent.

Obviously, Respondent had been aware by August 31 that Hayes had testified for the Union during the representation hearing.[5] Indeed, it is that very temporal sequence that John Poucher seemed to be attempting to evade when, as described in subsection D above, he claimed that the termination decisions had been reached on Thursday, August 26, and had been implemented as work had been scheduled to commence on Friday, August 27. Consequently, that testimony appears intended to place both the decision and its implementation before the representation hearing's commencement on August 27. But, in reality, that testimony shows only the unreliability of accounts advanced by John Poucher.

True, some support for an August 26 decision and for an August 27 termination might appear to be provided by Manderson's uncertainty about whether he had learned of his termination on a Friday or a Monday. Still, whatever facial support that testimony might appear to afford John Poucher's account is dissipated not only by Hayes and Frantz' testimony that their terminations had occurred on August 31 but, most significantly, by Respondent's express admission, in paragraph 5(a) of its answer to consolidated complaint, that it ''admits terminating the employment of Hayes, Frantz and Manderson on August 31, 1993.'' As a result there can be no ambiguity regarding the date of the terminations. And, therefore, there can be no hesitancy in concluding that in claiming that the termination decision and its implementation had been made on August 26 and 27, respectively, John Poucher had been trying to construct a defense on the basis of an untrue recitation of facts.

There is some basis for concluding that even prior to August 27 Respondent had known that Hayes, Frantz, and Manderson were involved with the Union. As described in subsection C above, John Poucher admittedly had attempted to ascertain the identities of the petition's supporters. Although Poucher claimed that ''nobody was talking'' and that he had not questioned Watling, Frantz credibly testified that he had informed Richardson, as well as Watling, of the identities of the individuals who had signed up for the Union. Although he disputed the means and place where that information had been disclosed to him by Frantz, Watling never disputed that such information had been related to him and Richardson by Frantz. And Richardson never appeared as a witness and denied having been told as much by Frantz.

Even if Watling, in fact, had not conveyed that information to John Poucher the latter concededly had questioned some persons about the petition's supporters. Because he obviously did not question the Anchorage crewmembers, his questions must have been directed to the crew then working in Kenai. An examination of payroll registers, included in the record as General Counsel's Exhibit 11, discloses that Richardson had worked 72 hours for Respondent during the 2-week pay period ending September 3.[6] John Poucher never specifically denied that Richardson had been one of the individuals from who Poucher had been ''trying to pick up some information[.]''

Even had John Poucher not been able to learn the identities of the Union's supporters prior to August 27 Hayes did testify for the Union at the hearing that day. Moreover, as discussed in subsection C above, the petition revealed that to make an adequate showing of interest in a six-person unit more than one unit member had to be supporting the Union. The only other two Anchorage crewmembers at that time were Frantz and Manderson. Given Hayes' appearance as the

[5] To be sure, Respondent likely would not have violated the Act had its termination of Hayes been actually motivated by the fact that Hayes, a statutory supervisor, was supporting a labor organization's campaign to become the bargaining agent of its employees. *Parker-Robb Chevrolet, Inc*., 262 NLRB 402 (1982), enfd. sub nom. *Food & Commercial Workers Local 1095 (Parker-Robb) v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). Respondent never advanced that broader basis, however, that its true reason for terminating Hayes had been his general support for the Union's campaign as disclosed by his appearance during the representation hearing, as the motivation for its decision to terminate him. ''The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.'' *Inland Steel Co.*, 257 NLRB 65 (1981). In consequence, ''mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds.''*NLRB v. Symons Mfg. Co*., 328 F.2d 835, 837 (7th Cir. 1964). Accord: *Singer Co. v. NLRB*, 429 F.2d 172, 179 (8th Cir. 1970). Inasmuch as Respondent has neither contended nor shown that it terminated Hayes because of his general support for the Union's campaign, the sole issue that must be addressed is whether or not the evidence supports a conclusion that his termination had been motivated by his appearance as a witness for the Union during the representation hearing in violation of Sec. 8(a)(4) and (1) of the Act.

[6] The documents in that exhibit will again become significant in connection with some challenged ballots, covered in sec. IV, infra. So this is a good place to point out that although a date is inserted as ''Pay Date'' in the upper left corner of the payroll registers, a ''Period Ending'' column appears above the list of personnel's names on each register. That latter date is a few days earlier than the stated ''Pay Date'' in each instance, indicating that there is a gap between the end of a pay period and the date on which persons employed by Respondent are actually paid for the payroll period.

Union's witness on August 27, Respondent could reasonably infer or suspect at that point that one, or perhaps both, of those other two crewmembers had supplied support for the petition, especially as John Poucher had been questioning the Kenai crew, none of whom, so far as the evidence shows, had been supporting the Union. Of course, termination motivated by suspicion of union activity is no less unlawful than termination motivated by actual knowledge of it. That is, ''the Act is violated if an employer acts against the employees in the belief that they have engaged in protected activities, whether or not they actually did so.'' *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). ''Proof of an unfair labor practice does not require proof of actual union activity . . . .'' *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, 98 (8th Cir. 1965).

In fact, a preponderance of the evidence does establish that Respondent had terminated Hayes because of his appearance as the Union's witness at the representation hearing and, as well, Frantz and Manderson because they supported, or likely supported, the Union's effort to become the bargaining agent of Respondent's employees. That is shown by Respondent's animus toward unions and toward employees who supported them. It is shown by the termination of Hayes at the beginning of the workweek immediately following the day on which he testified. It is shown by the evidence of likely actual knowledge, as a result of John Poucher's admitted questioning, of Frantz and Manderson's union support, or at least of suspicion that they were union supporters based on the petition's disclosure and their site supervisor's appearance during the representation hearing.

It is further shown by certain other factors. Rather than permit Sutton to select an appropriate personnel action to be taken to meet the declining workload, as had been the practice before, John Poucher took it on himself to decide on termination and to select the individuals who would be terminated.

Further, even though John Poucher testified that the soil to be processed in Anchorage had been depleted after conclusion of the day shift on Thursday, August 26, Respondent took no personnel action based on that depletion, John Poucher's unreliable assertions to the contrary notwithstanding, until after Hayes had testified at the representation hearing. That is no one was separated on Friday, August 27, even though soil to be processed had been supposedly depleted during the preceding day and there was no work for anyone on Friday. In fact, it appears that on that day Respondent had simply followed the same course as Sutton had testified that he would have followed had the decision been left to him, which was to simply schedule no one for work until enough soil became available to process efficiently. Indeed, that is what Respondent also did during most of the following workweeks. Yet, in contrast to other employees who then were working, Hayes, Frantz, and Manderson were terminated instead of being merely left unscheduled to work.

The termination were effected abruptly. That is by simply not scheduling work on Friday, August 27, Respondent suddenly terminated the discriminatees on August 31 following the representation hearing. ''The abruptness of a discharge and its timing are persuasive evidence as to motivation.'' *NLRB v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957). Accord: *NLRB v. Sutherland Lumber Co.*, 452 F.2d 67, 69 (7th Cir. 1971); *NLRB v. Elias Bros. Big Boy, Inc.*, 325 F.2d 360, 366 (6th Cir. 1963); *United Dairy Farmers Coop. Assn. v. NLRB*, 633 F.2d 1054, 1062 (3d Cir. 1980). Moreover, when they were informed of their terminations, not one of the discriminatees was given a reason for being terminated, a further indicia of unlawful motivations.

In fact, the very absence of a credibly advanced defense by Respondent for those terminations is further evidence of unlawful motivations. And, of course, that unreliability obliterates any basis for satisfaction of Respondent's burden of showing that the terminations would have occurred in any event, notwithstanding Hayes' appearance as a union witness during the representation hearing and notwithstanding Frantz and Manderson's support or seeming support for the Union.

As pointed out above, an unreliable sequence of events supposedly leading to the termination decision on Friday, August 27, was advanced by John Poucher, Respondent's principal witness. His testimony pertaining to the substantive reasons for selecting each of the three discriminatees fares no better when analyzed in connection with other evidence including some presented by Respondent itself.

According to Poucher one criterion for selection had been seniority. Sutton testified, however, that seniority ''never was followed before'' in selecting personnel for separation from Respondent's employment. That testimony by Sutton was never contradicted. In fact, it appears to have been supported by a layoff of two laborers that occurred during the workweek ending on August 20.

As John Poucher would have it on August 31 Manderson had been the least senior laborer then employed in its Alaska division. That conclusion rests on the evidence that although he had been employed by Respondent since mid-1992 Manderson had been classified as a laborer only since late July of the following year. But that would also mean that Manderson had less seniority as a laborer than Mike Turner and Greg Garrison, two Kenai crewmembers whom Poucher testified were laid off prior to transferring the remaining Kenai crew to Anchorage to work a second shift during the week of August 23 to 27.[7] Yet, according to Respondent's Exhibit 7, Turner had been hired February 16 and Garrison on March 24, in both instances, before Manderson had become classified as a laborer.

Obviously their selections would not have been occasioned by transfer of the Kenai crew to Anchorage. ''All the Alaska people travel between work sites,'' testified John Poucher. Frantz agreed that crewmembers had been moved between the Kenai and Anchorage sites. Of course, that is what happened to the remaining Kenai crew for the workweek of August 23 to 27. Accordingly, the fact that the less senior laborer Manderson would have been allowed to continue working during that week, while more senior laborers had been laid off, supports Sutton's testimony that seniority had never been a criterion for selecting employees for separation.

Furthermore, an added problem arose for Respondent from its claim that it had calculated Manderson's comparative seniority from the time that he had become classified as a laborer. If that truly had been its practice, then Watling, not

[7] As recited in subsec. B above, by August 31 Turner had last worked for Respondent during the workweek ending July 23. Thus, he could not have been laid off during the workweek ending August 20. He is, however, included here simply because of Respondent's assertions and for purposes of analyzing its advanced defense.

Hayes, should have been selected as the shift supervisor for termination on August 31. That is so because, as set forth in subsection B above, it is undisputed that Hayes had been classified as a site supervisor since mid-1992, whereas Watling testified that he had been a site supervisor only ''[s]ince February of last year [1993].'' But then, of course, Watling had not testified on a union's behalf in a representation proceeding.

Finally, no mention whatsoever is made of seniority as a termination criterion in Respondent's November 12 letter that purports to recite the reason advanced to the discriminatees on August 31 for their terminations. In light of that and the foregoing other considerations, there is no basis for crediting Respondent's assertions that seniority had been one criterion for its termination selections. And the fact that Respondent has chosen to now advance it as a supposed reason gives rise to an inference that Respondent is attempting to construct a defense because no lawful one is available to it.

A similar conclusion is warranted based on scrutiny of the evidence pertaining to Respondent's other defense concerning better production by the Kenai crew than by the Anchorage one. It is undisputed that at the time they were notified of their terminations not one of the discriminatees had been told anything about less favorable comparative production in Anchorage. To the contrary, so far as the record discloses, that reason was not injected until after the charges pertaining to those terminations had been filed and Respondent was called on to provide a defense for effecting them.

Beyond that, Frantz acknowledged that ''our costs [in Anchorage] were higher than all [Respondent's] other plants system-wide.'' Yet, simple numerical comparisons, of themselves, do not fully address the question of which crew performed better. It is undisputed that throughput and, concomitantly, labor cost per ton, is affected by moisture content of soil, as well as by extent of its contamination. For example, Sutton testified, ''Like your contamination, if [the soil's] highly contaminated, you can't run it through as fast, you got to run it through slower.'' And Hayes testified,

> [M]oisture does a couple of things. It—it—it masks your—your—your scanner eyes and shut your burner down and gets you out of emissions in a heartbeat. That's one of the—that's probably the primary—one of the primary things. But also, the moisture is just—takes more fuel to burn as well on the front end to—to drive off that moisture before it can even start drying the material—the soil. But basically, your—your moisture—it does mask the scanners, it'll shut the system down, and you have to start over again, at least on the afterburner.

At no point did Respondent challenge that testimony by Hayes. Indeed, in his November 12 letters, quoted in subsection E above, John Poucher singled out ''high moisture content'' as the reason for not ''process[ing] the Indian job at this time.''

Nor, more specifically, did Respondent contest Sutton's testimony that,

> [P]articularly with one-oh-one, and that afterburner doesn't accept moisture very well. It just doesn't seem to handle it. That particular one, you can notice a seven-percent moisture to 15-percent moisture is—is—would cut your production probably in half or—or even worse than that.

Consequently, without evidence pertaining to extent of moisture and contamination, which Respondent never provided, it is not possible to reliably conclude from comparative throughput, alone, that the Kenai crew actually did perform measurably better than Hayes, Frantz, and Manderson in Anchorage.

In fact, Sutton, who had been in overall charge of both sites through August, testified, ''Performance, they were both—as far as I was concerned, both sites were equal on their performance.'' And during the period when both crews worked in Anchorage (Monday through Wednesday, August 23 through 25) although the Kenai crew's performance had been slightly better, John Poucher evaluated the two crews' performances overall as ''pretty equal.''

To be sure, testifying as a witness for Respondent, Watling seemed to be claiming that the Kenai crew had performed better than had the one in Anchorage. That testimony should not be unexpected, of course, given Watling's inherent self-interest as the shift supervisor for the Kenai crew. Even so, his conclusion was phrased equivocally. For example, asked if he thought he could have improved production on the SRU 101 plant during July and August Watling answered, ''Yeah,'' but then added hastily, ''I would *think* so.'' (Emphasis added.)

As he testified Watling appeared generally to be trying to tailor his testimony so that it would be as favorable for Respondent as possible. As a result he did not appear to always be testifying candidly. One illustration of the trouble that he thereby created for himself, and for Respondent, emerged when he advanced an account regarding the situation in Anchorage in mid-August or after August that bears comparison with John Poucher's description of the situation there during his first visit to Alaska, as set forth in subsection B above.

Inasmuch as there is no evidence that Watling had worked in Anchorage during the summer before the last week in August presumably he was describing a supposed situation there from that last August week.

> There were lots of things that were, I guess jerry-rigged so that they would worked [sic]. But they could have caused a real problem if somebody would've, you know, I mean, it could've caused a problem pretty easily. As far as the wiring for our propane pumps, the connectors weren't proper—properly—well, they had electrical tape instead of a plug.

Yet, earlier that month, or in late July, John Poucher had supposedly conducted an examination of the SRU 101 plant, accompanied by Sutton, and had ''got[ten] everything repaired[.]'' If so, then seemingly there could have been no problems with that plant for Watling to discover shortly afterward. For Poucher advanced no explanation of any problems that could possibly have arisen during the interim between his first Alaska visit and Watling's transfer to Anchorage. To the contrary, as quoted in subsection B above, John Poucher testified that after his adjustments to SRU 101 that plant ''ran relatively smoothly'' through August.

A correspondence of terminology also should not pass without some notice. As quoted above, Watling claimed that he had observed, ''lots of things that were, I guess jerry-

rigged,'' and John Poucher claimed that a few weeks earlier he had observed ''several situations that were, I'd say jimmy-rigged, I guess.'' Use of two similar terms, neither of which is commonly encountered in discourse, raises some suspicion that these two witnesses were working from a common script, particularly as they were testifying to events supposedly separated in time to achieve a common result. Even if not, however, had John Poucher truly encountered ''jimmy-rigged'' conditions and repaired them, as he testified, then there seemingly should have been no ''jerry-rigged'' conditions for Watling to discover shortly after John Poucher had done so. At least, not absent additional particularization of those supposed conditions, which has not been provided by Respondent.

It is not disputed that during August Watling had announced, with respect to the Union, he desired to ''stay away from the whole thing,'' and, of course, he remained employed by Respondent on the date of the hearing in this matter. Given my impression formed as he testified, and the foregoing considerations that tend to confirm that impression, those two factors further reinforce my conclusion that Watling cannot be credited. Nor, as concluded above, do I credit John Poucher. As a result, Respondent has failed to advance a credible defense and, in consequence, has failed to satisfy its burden in the face of a prima facie showing of unlawful motivations for the August 31 terminations.

In sum, given the evidence of Respondent's hostile attitude toward unionization of its employees, the evidence of Hayes' activity in testifying for the Union during a representation hearing conducted by the Board and of Frantz and Manderson's activity supporting the Union, the evidence of Respondent's actual knowledge of Hayes's activity during the hearing and of its actual knowledge or, at least, likely suspicion that Frantz and Manderson supported the Union, the evidence of the terminations' timing in relation to the first day of the representation hearing, and the unreliability of Respondent's defense to those terminations, I conclude that a preponderance of the credible evidence establishes that Hayes had been terminated in violation of Section 8(a)(4) and (1) of the Act and that Frantz and Manderson had been terminated in violation of Section 8(a)(3) and (1) of the Act.

''All discriminatees have an absolute legal right to restoration to their former status and pay.'' (Fn. omitted.) *Hydro-Dredge Accessory Co*., 215 NLRB 138, 139 (1974), that means that they are ''entitled to an unequivocal and unconditional offer of reinstatement.'' *K & E Bus Lines*, 255 NLRB 1022, 1022 (1981). That is the reinstatement offer ''must be specific, unequivocal, and unconditional in order to toll backpay and satisfy a respondent's remedial obligation.'' *Holo-Krome Co*., 302 NLRB 452, 454 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991). And ''an offer is insufficient . . . if it does not restore seniority or other benefits accrued by the employee; if the job which he is offered is temporary; if it is conditioned upon the employee relinquishing his unfair labor practice claim; [or] if the employee has insufficient time to accept the offer.'' *Morvay v. Maghielse Tool & Die Co*., 708 F.2d 229, 232 (6th Cir. 1983), cert. denied 464 U.S. 1011 (1983), cited in the context of reinstatement offers made under the Act, *NLRB v. Seligman & Assoc*., 808 F.2d 1155, 1159 (6th Cir. 1986).

When an invalid offer of reinstatement is made a negative response to it is of no consequence. ''It is thus incumbent on the Respondent to extend to the injured employee a facially valid offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer.'' *Consolidated Freightways Corp*., 290 NLRB 771, 773 (1988). These principles, set forth in this and the preceding paragraph, govern disposition of Respondent's post-August 31 communications with Hayes, Frantz, and Manderson, as described in subsection E above.

With respect to the pre-November 12 oral communications with Manderson and Frantz, Respondent's officials, Johnson and Watling, did no more than inquire whether those two discriminatees were willing to return to Respondent's employment. Thus, Johnson asked merely whether Manderson ''was interested'' in, or ''was ready'' to, return to work. A similar question was put to Frantz by Watling. Yet, ''an inquiry as to whether an employee is interested in employment [does not] constitute an unconditional offer.'' *Montgomery County MH/MR Emergency Service*, 239 NLRB 821, 827 (1978).

Not only were those communications facially insufficient as reinstatement offers but Respondent's conduct in connection with them nullified whatever partial validity might otherwise be attributed to them. When Manderson inquired about the terms of resumed employment both Johnson and Watling promised to find out the answers and to call Manderson to inform him of the answers to his questions. But neither official did so. Although Watling claimed that he had not done so because Manderson had demanded a raise as a condition to returning, Manderson credibly testified that he had requested a raise solely because Watling had said that Manderson would be reemployed in a higher rated position than that of laborer, the one occupied by Manderson when he had been terminated on August 31. Accordingly, Manderson imposed no condition on returning to work for Respondent as a laborer. He simply sought a raise if he were to be employed in a different position compensated ordinarily at a higher rate of pay. Inasmuch as Respondent never did answer Manderson's other employment related questions it cannot be said that Respondent had offered to fully restore him to the position from which he had been terminated unlawfully.

Similarly, Frantz never was contacted again after he expressed to Watling interest in resuming employment with Respondent. When Frantz pursued the matter, by telephone and by visiting Respondent's Anchorage site, Watling told him to report. But when Frantz did so Watling was nowhere to be located and, eventually, Frantz was told not to work. Later he was told by Watling that there was no work for him. In view of these events, there is no basis for concluding that prior to November 12 a genuine offer of reinstatement had been made to either Frantz or Manderson.

Nor can it be concluded that reinstatement had been truly offered by Respondent's November 12 letter. That letter does no more than invite the discriminatees to ''report for work'' at 8 a.m. on November 15. At no point in it is there a specific statement that reinstatement is being offered. Nor can it be said that reinstatement is naturally implied from the letter's language. Instead, the best that can be said is that the letter is offering mere reemployment.

Although not always observed by language sometimes utilized in decisions, there is a recognized distinction between the concept of reinstatement and that of reemployment. See,

e.g., *Colorflo Decorator Products*, 228 NLRB 408, 420 (1977), enfd. mem. 99 LRRM 3327 (9th Cir. 1978), and cases cited therein. A mere offer of reemployment does not, either expressly or inherently, remedy all consequences of previously committed unfair labor practices. That is, it does not of itself correct the effect on resumed employment status of the hiatus in tenure resulting from an unlawful termination. For it leaves unaddressed the effects of that hiatus on such employment terms as seniority and tenure related benefits. In consequence, an offer only of reemployment deprives discriminatees of statutorily required assurance of full ''restoration to their former status[.]'' *Hydro-Dredge Accessory Co*., supra. See generally *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973); and *Oil Workers v. NLRB*, 547 F.2d 575, 588, 589 (D.C. Cir. 1976), cert. denied 431 U.S. 966 (1977).

At first blush, there might appear to be merit to an argument that discriminatees can secure answers to any questions arising from offers of mere reemployment through inquiry about those subjects directed to the offering respondent. Yet, it is the respondent, not the discriminatees, who engaged in unlawful conduct. As the wrongdoer it bears the burden of restoring the status quo and, concomitantly, of offering to do so. As the targets of unfair labor practices it hardly is equitable to impose on discriminatees a burden of going hand in hand to ask if a respondent who discriminated against them truly intends to abide by its statutory obligation of offering full reinstatement. In contrast, it is no great burden to require that respondents plainly state what they intend when offering employment to discriminatees. That is plainly state that it is ''reinstatement,'' and not something else, that is being offered. Allowing a lesser notification to satisfy the reinstatement obligation creates uncertainty for discriminatees, forces them to undertake a burden of correcting ambiguity created by respondents whose own unfair labor practices have already penalized those discriminatees, and creates an unnecessary risk of loss by those discriminatees of remedial rights to which they are entitled.

Beyond the words of the November 12 letter, when Manderson and Frantz did respond on November 15, they were told that even their possibility of reemployment was a conditioned one—conditioned on each employee signing a copy of the November 12 letter. As pointed out in subsection E above, that letter contained an indisputably untrue statement about what had been said to the discriminatees when they had been terminated.[8] That was at least one reason that the two discriminatees had refused to sign copies of the letter.

As set forth above, a reinstatement offer is not valid ''if it is conditioned upon the employee relinquishing his unfair labor practice claim[.]'' *Morvey v. Maghielse Tool & Die*, supra. To be sure, Respondent's condition did not rise to that level. But it did require signatures indicating agreement to an untrue fact that fortified Respondent's defense to the discriminatees' charges. If they had signed the discriminatees likely could have undermined their own ability to prevail on those charges.

[8] Lest there be doubt, I do not credit Watling's assertions that he withdrew the signature condition during his November 15 interview with Frantz and Manderson.

A respondent is no less precluded from accomplishing by indirection that it can not accomplish directly. That is a reinstatement offer is no less invalid because, rather than conditioning it on total withdrawal of a charge, a respondent conditions it on admissions of untrue fact that would diminish employees' ability to obtain a fair determination of their charges' merits, one untainted by extracted admissions to adverse facts that are not true.

Hayes received the November 12 letter too late to comply with the reporting date and time specified in it. Had he been able to do so, however, there is no basis for concluding that he would have fared differently then did Frantz and Manderson and would not have been required to sign a copy of the November 12 letter. Consequently, as the letter is not truly an offer of reinstatement and was tainted by the condition that it be signed to secure reemployment, no burden shifts to Hayes to accept or reject the letter's offer. As a result, subsequent events involving Hayes and Respondent, with regard to that letter, are not material.

Finally, with respect to Respondent's letter of March 22, 1994, like the pre-November 12 oral communications with Frantz and Manderson, that letter makes no offer whatsoever to the discriminatees. It merely notifies them that Respondent expects to begin operations in Anchorage and directs them to ''contact Amanda . . . before March 31 if you will return to work.'' There is no promise, express or implied, that should any of them follow that direction he will be allowed to resume working for Respondent.

Even if it be concluded that the letter somehow naturally implies that employment will follow from such a ''contact,'' the letter does not state, nor imply, that it is reinstatement that is being offered. At best, as with the November 12 letter, only reemployment can be implied from the terse wording of the March 22, 1994 letter. Indeed, although Frantz did respond and did resume working for Respondent there is no evidence that he had actually been reinstated as opposed to merely reemployed.

It should not be disregarded that at the time of receiving the letter of March 22, 1994, none of the discriminatees could know whether a response would generate even reemployment, as turned out to be the fact for Frantz. Viewing the matter from the discriminatees' perspective on receiving those letters there was ample basis for them to reasonably believe that the letter was just another bad-faith effort by Respondent to toy with them concerning resumed employment. Manderson had orally expressed interest in returning to work prior to November, but never received the promised answers to his questions and, indeed, never received any further telephone communications from Respondent after the one in which he had expressed that interest. Frantz did follow up on a similar communication and was directed to report, only to be hustled from work at the site and then told that there had not truly been a job for him. When he and Manderson reported as specified in Respondent's November 12 letter they were told that they could return to work, but only on condition that they sign letters containing an untrue statement pertaining to the circumstances under which they had been terminated.

In sum, through its own earlier displays of bad faith in connection with resumed employment by the discriminatees Respondent fouled its own nest of credibility with them by March 22, 1994. Its letters of that date made no promise

whatsoever of either reinstatement or even reemployment should one or more of them ''contact Amanda.'' Nothing in the letters affords any assurance that employment would follow from such ''contact.'' Neither the wording of the letters nor the circumstances in which they had been received, 2 weeks before the hearing on their charges was scheduled to commence, afforded any assurance that the discriminatees would not once again be confronted with nonresponse or with conditions on reemployment. In these circumstances, there is no basis for concluding that the March 22, 1994 letters constituted a specific, unequivocal, and unconditional offer of reinstatement sufficient to bar Hayes and Manderson from reinstatement offers, because they did not respond, as a result of this proceeding. Although Frantz was reemployed, he has not yet received the statutorily required offer of reinstatement.

IV. THE CHALLENGED BALLOTS

Twelve ballots were challenged during the November 9 representation election. Three of those were cast by Frantz, Manderson, and Hayes. As it is conceded that the latter had been a statutory supervisor the challenge to his ballot is sustained. Because I concluded in section III above that Frantz and Manderson had been unlawfully discharged on August 31 the challenges to their ballots are overruled.

Two ballots, cast by Steven Sand and Thomas Ries, were challenged by the Union on the basis that neither voter is ''an Alaska resident.'' That question was addressed and resolved, however, by the Regional Director in his decision and direction of election issued on October 7.

> [T]o some extent it appeared that [the Union] was contending that only permanent Alaska residents should be included in the unit. However, [the Union]'s last word on the subject was that it wanted to represent only those who were ''residents working Alaska . . . doing work in Alaska.'' Therefore, irrespective of the record discussion, it appears that [the Union] was not attempting to define the unit in terms of state residency, but merely asserting that it had no wish to represent employees of [Respondent] who are employed in states other than Alaska, such as those formerly employed in Alaska who have since transferred to other states.

Because it appears that the Regional Director concluded that Alaska residency would not be a criterion to eligibility, the fact that Sand and Ries may not have been Alaska residents does not, on that basis, bar them from participating in the election and having their ballots counted.

The Regional Director's decision continues by pointing to a distinction between so-called ''temporary'' and ''permanent'' employees, with the distinction being that the former are Alaska residents laid off when there is no work available at Respondent and with the latter being employees ''who derive their status as 'permanent' from their overall employment with [Respondent]; rather than being laid off, as are employees who remain in Alaska, they are relocated to other states,'' with ''no better (or worse) prospects of being recalled to Alaska than do those hired as 'temporaries' who have being laid off.'' Regarding that distinction, the Regional Director concluded that ''the appropriate unit of all employees employed by [Respondent] at its Alaska facilities necessarily includes both permanent and so-called 'temporary' employees, without distinction.''

As a result, eligibility of Sand and Ries depends on their employment in the unit during the eligibility period. Regarding that question, received as General Counsel Exhibit 11, according to the General Counsel's representation when offering it, ''is a series of [A]utopay payroll registers, starting with the pay date of September 9th and going through December 30, 1993.'' Those are the documents referred to in subsection III,F above and explained further in footnote 6. So far as the evidence shows those records list all employees employed in Alaska by Respondent during the periods encompassed by them. At least, no party has offered additional pages for the period, nor represented that any others existed.

Omitted completely from those registers are the names of Sand and Ries, although Respondent's Exhibit 7 shows that both had spent periods working in Alaska prior to August 20. Respondent argues in its brief that Sand had ''returned to work in Alaska on October 24, 1993 for work on the Indian project'' and, further, that Ries had ''worked for [it] during the payroll period immediately preceding October 7 [and] returned to Alaska on the Indian project on October 25, 1993.'' Neither of those arguments, however, is supported by inspection of the payroll registers for those periods. That is, the name of neither man is listed on the registers for the pay dates of October 21 (covering two 2-week pay period ending October 15), of November 4 (covering the 2-week pay period ending October 29), nor of November 18 (covering the 2-week pay period ending November 12). Furthermore, John Poucher's November 12 letters, quoted in subsection III,E above, state that ''We cannot process the Indian job at this time'' and there is no evidence that Respondent had been able to do so prior to November 12. In those circumstances it is not possible to conclude that Sand and Ries had been working for Respondent during the preelection period.

No evidence has been presented to show that Sand or Ries had been on layoff, awaiting recall, during the eligibility period. Consequently, there is no basis for concluding that either voter had been eligible to vote in the election. Similarly, Respondent states that neither Randall Roe nor Wesley D. Faulkner had been employed during the eligibility period, and there is no evidence to the contrary. Therefore, I sustain the challenges to the ballots of Steven Sand, Thomas Ries, Randall Roe, and Wesley D. Faulkner.

A like result is warranted with regard to the challenged ballots cast by Joe Pete Smith and Robert D. Hughes. In its brief Respondent states that Smith had not been hired until after October 7. General Counsel's Exhibit 11 does not list his name until the pay period of October 30 through November 12, that is, after commencement of the eligibility period. Moreover, in its brief Respondent represents that Robert D. Hughes had been ''permanently separated'' early in 1993 and his name does not appear on any register in General Counsel's Exhibit 11. Accordingly, I sustain the challenges to the ballots of Joe Pete Smith and Robert D. Hughes.

Respondent's brief also asserts that Terika Kons had ''worked during the period immediately preceding October 7, 1993.'' Yet, that name does not appear on Respondent's Exhibit 7 as having been employed in Alaska prior to August 20. And it is not one of the names appearing on the October 7 payroll register for the pay period ending October 1, ''the payroll period ending immediately preceding the date of issu-

ance of the notice of election,'' as prescribed for eligibility by the Regional Director's direction of election. Consequently, although Kons did work 16 regular and 4 overtime hours during the succeeding pay period, the one ending October 15, that is after the payroll period specified for eligibility and, consequently, I sustain the challenge to the ballot of Terika Kons.

Regarding Thomas Knack, Respondent's Exhibit 7 states that he had worked in Alaska for Respondent since September 16, 1992. During the workweek ending August 20 he worked 40 hours for it, presumably in Kenai inasmuch as only Hayes, Frantz, and Manderson had been then working in Anchorage. As stated in subsection III,F above, by the end of that week Respondent laid off all Kenai crewmembers, save for those relocated to Anchorage. Accordingly, it is a fair inference that Knack had been laid off then, even though his name was not specifically mentioned in the sparse testimony describing that Kenai layoff. Moreover, he resumed working during the payroll period ending November 12. That had been the one during which the election had been conducted. Apparently, he worked during that entire pay period, for the payroll register shows that he worked 80 regular and 60 overtime hours during it.

In sum, it appears that from August 20 through October 29 Knack had been on temporary layoff and, thus, is eligible under the Regional Director's above-quoted description of Respondent's Alaska practice, and his direction of eligibility for ''employees who did not work during that [payroll period ending immediately preceding the date of issuance of the notice of election] because they were . . . temporarily laid off.'' Knack appears to have been such an employee and, accordingly, I overrule the challenge to the ballots that he cast.

Finally, John Poucher identified Mike Turner as one of the Kenai employees laid off during the workweek ending August 20. As pointed out in footnote 7, however, that cannot be true because, as set forth in subsection III,B above, prior to August 20 he had last worked during the workweek ending July 23. Yet, General Counsel's Exhibit 11 shows that Turner had returned to work in Alaska for Respondent during the pay period ending October 15, when he worked 79 regular and 38.75 overtime hours. And he continued working there through the pay period ending December 10. Since commencing work for Respondent on February 16 there had been earlier weeks when Turner had performed no work for Respondent but had then resumed working for it. Thus, it would appear that like Knack, Turner had been ''temporarily laid off'' at the beginning of the eligibility period, albeit for a longer period than Knack, and is eligible to vote under the terms of the direction of election. I overrule the challenge to the ballot that he cast.

CONCLUSIONS OF LAW

CleanSoils, Inc. committed unfair labor practices affecting commerce on August 31, 1993, by terminating Michael Hayes because he testified at a representation hearing as a witness for International Union of Operating Engineers, Local Union No. 302, AFL–CIO, in violation of Section 8(a)(4) and (1) of the Act, and Stan Frantz and Bruce Allen Manderson Jr. because of their support or suspected support for that labor organization, in violation of Section 8(a)(3) and (1) of the Act. Furthermore, I conclude that with regard to the election conducted in Case 19–RC–12751 challenges to the ballots of Michael Hayes, Steven Sand, Thomas Ries, Randall Roe, Wesley D. Faulkner, Joe Pete Smith, Robert D. Hughes, and Terika Kons be sustained, while challenges to the ballots of Stan Frantz, Bruce Allen Manderson Jr., Mike Turner, and Thomas Knack be overruled.

THE REMEDY

Having concluded that CleanSoils, Inc., has engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it will be ordered to offer immediate and full reinstatement to Michael Hayes, Stan Frantz, and Bruce Allen Manderson Jr., dismissing, if necessary, anyone who may have been hired or assigned to perform the jobs from which they were terminated on August 31, 1993. If those positions, or any of them, no longer exist, it will be ordered to offer reinstatement to a substantially equivalent position or positions without prejudice to seniority or other rights and privileges. It will also be ordered to make Hayes, Manderson, and Frantz whole for any loss of pay and benefits suffered because of their unlawful terminations, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It will be further ordered to remove from its files any reference to the unlawful terminations of August 31, 1993, and notify Hayes, Manderson, and Frantz in writing that this has been done and that the terminations will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, CleanSoils, Inc., Roseville, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating, discharging, or otherwise discriminating against Michael Hayes or any other person for testifying in a hearing conducted by the Board.

(b) Terminating, discharging, or otherwise discriminating against Stan Frantz, Bruce Allen Manderson Jr., or any other employee because they support, or are suspected of supporting, International Union of Operating Engineers, Local Union No. 302, AFL–CIO or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Hayes, Stan Frantz, and Bruce Allen Manderson Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Post at its Anchorage and Kenai, Alaska sites copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the challenges to the ballots cast by Michael Hayes, Steven Sand, Thomas Ries, Randall Roe, Wesley D. Faulkner, Joe Pete Smith, Robert D. Hughes, and Terika Kons be sustained, while the challenges to the ballots cast by Stan Frantz, Bruce Allen Manderson Jr., Mike Turner, and Thomas Knack be overruled and that Case 19–RC–12751 be severed and remanded to the Regional Director for Region 19 so that he may open and count those ballots, and issue whatever certification is appropriate in view of the final tabulation.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''